Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1998

TROOPER TOMMY HOBBS,

Petitioner,

v.

KATHY LEE GEORGE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLES K. BABB*
TRACY FOLSOM MILNER
Assistant Attorneys General
Litigation Division
4545 N. Lincoln Blvd., Ste. 260
Oklahoma City, OK 73105
(405) 521-4274

GARY J. JAMES
P.O. Box 26684
Oklahoma City, OK 73126
(405) 521-9900

March, 1999

**Attorney of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

1588

QUESTION PRESENTED

1. Does the Court of Appeals have jurisdiction to entertain an appeal from the denial of a Rule 50(b) motion brought after a mistrial when qualified immunity had been asserted and there was no evidence presented showing what a reasonable officer would have done in the same circumstances in an excessive force case?

LIST OF PARTIES

The parties to this proceeding on Petition for Writ of Certiorari are:

Petitioner:

Trooper Tommy Hobbs

Defendant in the District Court and Appellant in the United States Court of Appeals for the Tenth Circuit

Respondent:

Kathy Lee George

Plaintiff in the District Court and Appellee in the United States Court of Appeals for the Tenth Circuit

TABLE OF CONTENTS

Page

Opinion Below 1

Statement of Jurisdiction..... 1

Statutory And Constitutional Provisions..... 2

Statement Of The Case 3

Reasons For Granting The Petition..... 4

Conclusion 7

TABLE OF AUTHORITIES

Page

Cases

Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865 (1989) 3

Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806 (1985) 6

O'Neill v. Town of Babylon, 986 F.2d 646 (2nd Cir. 1993) 4, 5, 6

Statutes

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 ..... 2, 3

Constitutional Provisions

4th Amendment 2

Federal Rules of Civil Procedure

Rule 50(b) 1, 3, 4, 5

PETITION FOR WRIT OF CERTIORARI

Trooper Tommy Hobbs respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The Order of the United States Court of Appeals for the Tenth Circuit dismissing Petitioner's appeal is dated February 8, 1999. Order, Case No. 98-7058 (Appendix A).

The United States Court of Appeals' Order dismissed the appeal on the basis that it lacked jurisdiction for the appeal from the United States District Court for the Eastern District of Oklahoma's denial of Petitioner's Motion for Judgment pursuant to Rule 50(b)(2)(B) of the Federal Rules of Civil Procedure based on the defense of qualified immunity (Appendix B).

The opinions of the Court of Appeals and the district court are unreported.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Tenth Circuit dismissed the appeal for lack of jurisdiction over the appeal of the denial of a Motion for Judgment pursuant to Fed. R. Civ. P. 50(b)(2)(B) on February 8, 1999. Petitioner invokes this Court's jurisdiction pursuant to 28

U.S.C. § 1254(1). The Petition for Writ of Certiorari is timely filed within 90 days of February 8, 1999.

STATUTORY AND CONSTITUTIONAL PROVISIONS

United States Code, Title 42:

§ 1983. Civil Action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R.S. § 1979, Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

Amendment IV Constitution of the United States:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

1. This is an action pursuant to 42 U.S.C. § 1983, wherein George seeks recovery against Hobbs while Hobbs was acting under color of state law as a Trooper for the Oklahoma Highway Patrol.

2. Prior to the trial, the district court granted Hobbs' motion for summary judgment as to all of the Plaintiff's claims except the excessive force claim.

3. The case went to trial and to the jury on the sole question of whether the Defendant used excessive force against the Plaintiff.

The jury was hopelessly deadlocked so the District Judge declared a mistrial.

5. After the mistrial, Hobbs renewed his motion pursuant to Fed. R. Civ. P. 50(b) because Plaintiff failed to introduce any evidence showing what a reasonable officer would have done in the same circumstances. *See Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 1872 (1989) (whether the force was reasonable must be judged from the perspective of a reasonable officer on the scene).

6. The District Judge denied the motion and Hobbs appealed to the Tenth Circuit.

7. The issue on appeal was whether Hobbs was entitled to judgment based in part on qualified immunity.

8. The Court of Appeals for the Tenth Circuit declined to accept jurisdiction of the appeal. It held that a "renewed motion under Rule 50(b) is not appealable" until the district court disposes of the claim. The Tenth Circuit also held that "even if Defendant's motion were

construed as raising qualified immunity, the district court in denying the motion arguably believed the trial testimony contained sufficient fact-related information questioning the reasonableness of Defendant's use of force." (Court of Appeals slip op. at 2).

REASONS FOR GRANTING THE PETITION

This case presents the Court with the opportunity to resolve a conflict between the Circuits and to correct a lower court error.

I. THE CIRCUITS ARE IN CONFLICT.

In a case with a similar procedural history, the Second Circuit Court of Appeals found that it did have jurisdiction. *O'Neill v. Town of Babylon*, 986 F.2d 646 (2nd Cir. 1993) was a Section 1983 case where the district court denied the defendant's Rule 50 motions but granted his new trial motion. The defendant maintained on appeal that the district court should have granted the Rule 50 motions on the basis of qualified immunity. In determining that it had jurisdiction to hear the appeal, the Second Circuit reasoned that:

> [d]espite the absence of a final order, appellate jurisdiction is conferred in cases involving qualified immunity to protect government officials not only from liability for their actions but from the cost and inconvenience of having to defend an action through trial.

Id. at 649. In *O'Neill*, the plaintiff asserted that there were unresolved questions of fact and therefore there was a lack of jurisdiction. The Second Circuit determined that since there had been a "significant amount of pre-trial discovery and a full trial" that as "far as the discrete question of immunity is concerned, all material issues of fact concerning" the plaintiff's arrest "have been fleshed out at trial. A further factual inquiry is not necessary to resolve the question of qualified immunity as a matter of law." *Id.* Accordingly, since the issue of qualified immunity could be determined as a matter of law, there was jurisdiction to hear the appeal of denial of Rule 50 motions when the district court had ordered a new trial and the defendant was entitled to qualified immunity. *Id.*

In this case, the Tenth Circuit Court of Appeals refused to take jurisdiction of the appeal because the district court had not disposed of the excessive force claim, even though the Defendant had raised qualified immunity. This decision is in direct conflict with the Second Circuit's holding. The Defendant's Rule 50(b) motion was denied by the district court after a mistrial was declared due to a hung jury. The Plaintiff introduced no evidence concerning what a reasonable officer would have done in the same circumstances, thereby failing to offer any evidence that the Defendant did not use reasonable force. The Tenth Circuit found that it did not have jurisdiction even though the Defendant had asserted qualified immunity because the claim had not been disposed of by the district court. The Tenth Circuit also found that arguably the district court believed there were unresolved fact questions. Since the Second Circuit and the Tenth Circuit held differently on the same issue, there

is a clear conflict among the circuits. This Court should accept this Petition to decide the conflict.

II. THE TENTH CIRCUIT ERRED.

In addition, the Tenth Circuit Court of Appeals' refusal to take jurisdiction of an appeal of the denial of qualified immunity is in conflict with this Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806 (1985) where this Court held:

> a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable "final decision" within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment.

Id. at 530. This Court reasoned that qualified immunity is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, is effectively lost if a case is erroneously permitted to go to trial." *Id.* at 526 (emphasis in original).

The timing of the decision on the qualified immunity issue is not relevant to the jurisdiction of the Tenth Circuit Court of Appeals. Qualified immunity is immunity from suit and the immunity is lost if the defendant is forced to trial. *Mitchell, supra* at 526. In this case, if Hobbs is compelled to a second trial, the immunity would be effectively lost. The reasoning of *Mitchell* is especially applicable *because* Hobbs has already been through discovery and one trial and "[a] further factual inquiry is not necessary to resolve the question of qualified immunity as a matter of law." *O'Neill*, 986 F.2d at 649. The Tenth Circuit's refusal to accept jurisdiction deprives Hobbs of

the benefits of immunity from suit. Since the Tenth Circuit erred in refusing to accept jurisdiction when the Defendant had asserted qualified immunity, this Court should accept this Petition in order to correct the error of the Tenth Circuit.

CONCLUSION

This Court should grant certiorari to review the Tenth Circuit Court of Appeals' decision that it lacked jurisdiction and upon review, remand with instructions to consider the appeal on the merits.

Respectfully submitted,

CHARLES K. BABB* OBA #10195
TRACY FOLSOM MILNER, OBA #16113
Assistant Attorneys General
4545 N. Lincoln, Suite 260
Oklahoma City, OK 73105
(405) 521-4274 Fax (405) 528-1867

GARY J. JAMES
P.O. Box 26684
Oklahoma City, OK 73126
(405) 521-9900

Attorneys for Petitioner

**Attorney of Record*

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KATHY LEE GEORGE, Plaintiff - Appellee, v. TOMMY HOBBS, etc., Defendant - Appellant.	No. 98-7058

ORDER

Filed February 8, 1999

Before **PORFILIO, BALDOCK,** and **EBEL,** Circuit Judges.

This appeal is before the court based on a show cause order challenging appellate jurisdiction, the parties' jurisdictional memorandum briefs, and the preliminary record on appeal.

Plaintiff Kathy Lee George initiated a civil rights action alleging various constitutional violations arising out of her arrest and transport by a state highway patrol officer to a county jail after a traffic stop. In February 1998, the district court granted the remaining Defendant Tommy Hobbs' motion for summary judgment as to all of Plaintiff's claims except the excessive force claim. After a jury trial and approximately five hours of deliberation, the jury returned deadlocked. The district court declared a mistrial and ordered a new trial on the excessive force

claim. Defendant Hobbs filed a renewed motion under Fed. R. Civ. P. 50(b), contending the evidence was insufficient for a jury to conclude he used excessive force. The motion was denied. Defendant appeals. The excessive force claim remains unadjudicated.

The appeal is jurisdictionally defective. The district court order denying Defendant's renewed motion under Rule 50(b) is not appealable until the district court disposes of the remaining claim. *See Harolds Stores, Inc. v. Dillard Dept. Stores, Inc.*, 82 F.3d 1533, 1542 (10th Cir.), *cert. denied*, 117 S.Ct. 297 (1996). Thus, this court lacks appellate jurisdiction. Moreover, even if Defendant's motion were construed as raising qualified immunity, the district court in denying the motion arguably believed the trial testimony contained sufficient fact-related information questioning the reasonableness of Defendant's use of force.

The appeal is DISMISSED. The mandate will issue forthwith.

Entered for the Court,
Patrick Fisher, Clerk

FILE COPY

United States District Court
for the Eastern District of Oklahoma
April 27, 1998

Keith A. Ward, Esq.
6846 S. Canton
Suite 200
Tulsa, OK 74136

CIVIL MINUTES

6:97-cv-00535 George v. Hobbs

DOCKET ENTRY

MINUTE ORDER: denying defendant's renewed motion for judgment. (FHS) [45-1] (cc: all counsel)

WILLIAM B. GUTHRIE, Clerk

By: /s/ Tami Collins
Deputy Clerk

THIS NOTICE SENT TO THE FOLLOWING COUNSEL:

Keith A. Ward, Esq.
Richard A. Ford, Esq.
Charles K. Babb, Esq.
Tracy F. Milner, Esq.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

ATTEST:

WILLIAM B. GUTHRIE
Clerk, U.S. District Court
Eastern District of Oklahoma
BY /s/ Lisa Wilson
Deputy Clerk
DATED 5/1/98

SUPREME COURT, U.S.
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No. 98-1522

In The

Supreme Court of the United States

October Term, 1998

TROOPER TOMMY HOBBS,

Petitioner,

v.

KATHY LEE GEORGE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

KEITH A. WARD, ESQ.
6555 S. Lewis, Ste. 200
Tulsa, OK 74136
(918) 492-7674

Counsel of Record for Respondent

KEITH A. WARD, ESQ.
RICHARD A. FORD, ESQ.
6555 S. Lewis, Ste. 200
Tulsa, OK 74136
(918) 492-7674

Attorneys for Respondent in the Lower Court

April, 1999

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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COUNTER-STATEMENT OF QUESTION PRESENTED

1. Are there any sufficient reasons for this Court to grant Petitioner's Writ of Certiorari in this matter?

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

COUNTER-STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

REASONS FOR DENYING THE PETITION 3

I. THE CIRCUITS ARE NOT IN CONFLICT 3

II. THE TENTH CIRCUIT DID NOT ERR 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Alexander v. County of Los Angeles, 64 F.3d 1315 (9th Cir. 1995) 7

Barlow v. Ground, 943 F.2d 1132 (9th Cir. 1991) 7

Forrester v. City of San Diego, 25 F.3d 804 (9th Cir. 1994) 7

Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865 (1989) 6

Harold Stores, Inc. v. Dillard Dept. Stores, Inc., 82 F.3d 1533 (10th Cir.), *cert. denied*, 117 S.Ct. 297 (1996) 8

Liston v. County of Riverside, 120 F.3d 965 (9th Cir. 1997) 7

Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806 (1985) 3, 7, 8

O'Neill v. Town of Babylon, 986 F.2d 646 (2nd Cir. 1993) 3, 4, 5, 6, 7, 8

Scott v. Henrich, 39 F.3d 912 (9th Cir. 1994) 7

STATUTES AND RULES

28 U.S.C. § 1291 ..... 3, 8

42 U.S.C. § 1982 4

42 U.S.C. § 1983 ..... 1, 4

Federal Rules of Civil Procedure 50(a) 1

Federal Rules of Civil Procedure 50(b) 2, 3

Federal Rules of Civil Procedure 50(b)(2)(B) 1, 2, 6

COUNTER-STATEMENT OF THE CASE

1. Respondent, Kathy Lee George, brought this action pursuant to 42 U.S.C. § 1983 for various wrongful acts of the Petitioner, Tommy Hobbs, an Oklahoma Highway Patrol Officer.

2. During pre-trial litigation, Hobbs moved for summary judgment. His motion did not raise the defense of qualified immunity. All of George's claims were dismissed except her excessive force claim. The District Court ruled that there were genuine issues of material fact with respect to George's remaining claim.

3. This case proceeded to a jury trial on George's excessive force claim. At the conclusion of the Plaintiff's case, Hobbs moved for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. The District Court denied the motion. The motion asserted that there was no evidence to allow the jury to determine how a reasonable officer would have acted under the circumstances and no evidence that the Defendant did not act as a reasonable officer. After closing arguments, the Defendant renewed his Rule 50(a) motion for judgment as a matter of law which the District Court denied.

4. After deliberation, the jury announced that it was deadlocked and the District Court declared a mistrial.

5. Subsequently, Hobbs made a renewed motion for direct entry of judgment as a matter of law pursuant to Rule 50(b)(2)(B) of the Federal Rules of Civil Procedure. Hobbs argued exclusively that George failed to introduce any evidence showing what a reasonable officer would

have done in the same circumstances. This motion, as well as Hobbs' prior motions, did not raise the issue of qualified immunity.

6. The District Court denied Hobbs' Rule 50(b)(2)(B) motion. He appealed the District Court's denial of his Rule 50(b)(2)(B) motion to the Tenth Circuit. Hobbs argued that he is entitled to qualified immunity and that the issue of qualified immunity permits appellate jurisdiction as an exception to the final judgment rule.

7. Issues considered on appeal were whether the District Court had jurisdiction to hear petitioner Hobbs' appeal; whether the District Court reached a final decision; and whether the District Court issued a final order.

8. The Tenth Circuit Court of Appeals ruled that Hobbs' "appeal is jurisdictionally defective" holding that "the district court order denying Defendant's renewed motion under Rule 50(b) is not appealable until the district court disposes of the remaining claim." Moreover, the Tenth Circuit held that "even if Defendant's motion were construed as raising qualified immunity, the district court in denying the motion arguably believed the trial testimony contained sufficient fact-related information questioning the reasonableness of Defendant's use of force." *George v. Hobbs*, No. 98-7058, slip op. at 2 (10th Cir. Feb. 8, 1999).

SUMMARY OF ARGUMENT

Due to a mistrial in this case there has been no adjudication upon the merits and/or factual disputes.

Petitioner's appeal is not a final decision as required by 28 U.S.C. § 1291, and his renewed Rule 50(b) motion is not appealable. Furthermore, the issue of qualified immunity does not create an exception to this requirement in this case. Substantive issues of disputed material facts necessary to establish the defense of qualified immunity remain undecided and the trier of fact must determine whether Hobbs used excessive force in order for Petitioner to establish the defense of qualified immunity as a matter of law. Because the trier of fact has not made this determination, the Tenth Circuit Court of Appeals may not confer jurisdiction.

REASONS FOR DENYING THE PETITION

Petitioner's assertion of his defense of qualified immunity cannot be established as a matter of law, therefore the Circuit Courts are not in conflict and the lower courts did not commit error.

I. THE CIRCUITS ARE NOT IN CONFLICT

In support of his Petition, Trooper Hobbs contends that the Second Circuit Court of Appeals' ruling in the case of *O'Neill v. Town of Babylon*, 986 F.2d 646 (2nd Cir. 1993) and the Tenth Circuit Court of Appeals' ruling in this case are in conflict. On the contrary, in *O'Neill* the substantive issues of disputed material facts necessary to establish the defense of qualified immunity were decided at the district court level, thereby allowing the Second Circuit Court of Appeals to confer jurisdiction pursuant to this Court's ruling in *Mitchell v. Forsyth*, 472 U.S. 511,

105 S.Ct. 2806 (1985), despite the established requisite of a final order. However, in this case there still remains disputed issues of material fact, as evidenced by the trial court's ruling and the jury's inability to reach a final decision. Under these circumstances, the objective reasonableness of the Petitioner's conduct must be weighed by the trier of fact and the defense of qualified immunity cannot be decided as a matter of law.

In *O'Neill*, the Plaintiff filed suit against the Town of Babylon, New York and two of its bay constables. He asserted a claim for violation of his civil rights under 42 U.S.C. §§ 1982 and 1983. Specifically, he alleged that the town's officials harassed him in an effort to make him leave town. O'Neill also asserted claims of false arrest, malicious prosecution and excessive force which he alleged occurred during two separate arrests. In its opinion, the Second Circuit summarized the relevant procedural history of the case as follows:

> Tolkin and Hassan moved for summary judgment, asserting that they were entitled to qualified immunity with respect to the arrests of O'Neill. The court denied their motion on August 20, 1990. Tolkin and Hassan appealed, but we dismissed the appeal on September 6, 1990 because it was not perfected. The case proceeded to trial. At the close of O'Neill's case-in-chief, Tolkin and Hassan moved pursuant to Fed.R.Civ.P. 50(a) for judgment as a matter of law. The court granted this motion with respect to the false arrest and malicious prosecution claims arising from the June 20 arrest, but denied the motion with respect to the excessive force claims arising from the June 20 arrest and the claims against Tolkin and the Town arising from the June 24 arrest.

> **The jury returned a verdict in favor of Tolkin and Hassan on the excessive force claim arising from the June 20 arrest. The jury also returned a verdict in favor of Tolkin with respect to the false arrest claim arising from the June 24 arrest.** The jury, however, returned a verdict in favor of O'Neill on the malicious prosecution claim. It found that, although Tolkin had probable cause to arrest O'Neill on June 24, he nevertheless maliciously prosecuted O'Neill. The jury awarded O'Neill $5,000 in compensatory damages and $5,000 in punitive damages.
>
> Tolkin renewed his motions pursuant to Fed.R.Civ.P. 50(b) for judgment as a matter of law or, in the alternative, for a new trial pursuant to Fed.R.Civ.P. 59. On April 23, 1992, the court denied Tolkin's motion for judgment as a matter of law but granted his motion for a new trial on the ground that the jury's findings of probable cause and malicious prosecution were irreconcilable. On appeal, Tolkin challenges the court's denial of his rule 50 motion. He claims that he is entitled to qualified immunity as a matter of law, and therefore the court improperly denied these motions. We agree. (Emphasis added.)

Id. at 648-649. Clearly, the procedural scenario in *O'Neill* is distinguished from the present case. In this case, (1) the trial court determined that there were genuine issues of material fact concerning the objective reasonableness of Trooper Hobbs' actions which precluded granting summary judgment; (2) the trial court denied Petitioner's Rule 50(a) motion at the conclusion of the Plaintiff's case in chief; (3) the trial court denied Petitioner's renewed Rule 50(a) motion at the conclusion of closing arguments;

(4) the jury was unable to make a final determination as to any issue of material fact and the trial court declared a mistrial; and (5) the Petitioner's second renewed motion for judgment as a matter of law pursuant to Rule 50(b)(2)(B) was also denied by the trial court. Under these circumstances, *i.e.*, where no final judgment exists and where factual issues still remain as to a defendant's defense of qualified immunity, appellate courts lack jurisdiction. In fact, the Second Circuit in *O'Neill* acknowledged this jurisdictional prerequisite:

> Jurisdiction, however, is limited to circumstances where the qualified immunity defense may be established as a matter of law and **"is not available where the immunity issue turns on disputed issues of fact."** *White v. Frank*, 855 F.2d 956, 958 (2nd Cir. 1988). Indeed, **we lack jurisdiction when the determination of material factual issues is a "necessary predicate" to a resolution of whether qualified immunity is a bar to the litigation.** *Cartier, supra*, 955 F.2d at 844; see also *White, supra*, 855 F.2d at 962 (appeal from a summary judgment denying qualified immunity defense dismissed on ground that court lacked jurisdiction because "further exploration" was necessary to resolve the issue as a matter of law). (Emphasis added.)

Id. at 649.

Before the district court and/or any appellate court can make a determination as to whether an officer is entitled to qualified immunity from a claim of excessive force, the "objective reasonableness" standard as defined by this Court in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865 (1989) must first be applied to the officer's conduct.

Furthermore, in doing so, it is well settled that the reasonableness of force used by an officer is ordinarily a question of fact to be determined by the jury. *Liston v. County of Riverside*, 120 F.3d 965 (9th Cir. 1997), *citing Alexander v. County of Los Angeles*, 64 F.3d 1315, 1322 (9th Cir. 1995); *Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir. 1994); *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994); *Barlow v. Ground*, 943 F.2d 1132, 1135 (9th Cir. 1991).

In this case, questions of genuine material facts relating to Hobbs' conduct remain to be decided by the jurors in the new trial and the issue of qualified immunity cannot be decided as a matter of law. Therefore, the present case is clearly distinguished from *O'Neill*, the circuits are not in conflict, and the Tenth Circuit Court of Appeals properly dismissed the Petitioner's appeal as being jurisdictionally defective.

II. THE TENTH CIRCUIT DID NOT ERR

Petitioner contends that the Tenth Circuit Court of Appeals' refusal to accept jurisdiction of this appeal on the basis of qualified immunity is somehow in conflict with this Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806 (1985). However, as already stated, this case is an appeal regarding a question of qualified immunity in a case where issues of disputed fact clearly remain in dispute. Given these circumstances, the issue of qualified immunity, which hinges upon the factual determination of the reasonableness of Petitioner's conduct, cannot be decided purely as a matter of law. As such, this

case is distinguished from both *Mitchell* and *O'Neill, supra.*

The essence of the Tenth Circuit's dismissal of Petitioner's appeal was based upon the fact that the appeal was jurisdictionally defective because their was no final order disposing of all claims in the district court. Under these circumstances, there is no final order and a renewed Rule 50(b) motion is not appealable. *See Harold Stores, Inc. v. Dillard Dept. Stores, Inc.*, 82 F.3d 1533, 1542 (10th Cir.), *cert. denied*, 117 S.Ct. 297 (1996). As in *Harolds Store, Inc.*, Ms. George still has a viable claim before the District Court and, due to a mistrial, there has been no adjudication upon the merits and/or factual disputes in the case. Petitioner's appeal is not a final decision as required by 28 U.S.C. § 1291, nor does it fall within any exception to this requirement under *Mitchell* or *O'Neill, supra.* Therefore, the Tenth Circuit Court of Appeals did not commit any error in dismissing Hobbs' appeal and his Petition should be denied.

CONCLUSION

Because Petitioner's assertion of qualified immunity cannot be established as a matter of law, the Circuit Courts are not in conflict and the lower courts did not commit error. Therefore, Respondent respectfully requests that this Court deny Certiorari.

Respectfully submitted,

KEITH A. WARD, ESQ.
6555 S. Lewis, Ste. 200
Tulsa, OK 74136
(918) 492-7674

Counsel of Record
for Respondent

KEITH A. WARD, ESQ.
RICHARD A. FORD, ESQ.
6555 S. Lewis, Ste. 200
Tulsa, OK 74136
(918) 492-7674

Attorneys for Respondent
in the Lower Court

Dated: April, 1999